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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

NATIONAL LEAD COMPANY, APPELLANT,
v.
THE UNITED STATES. } No. 123.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from a judgment dismissing the petition. Appellee sued to recover $89,162.04 additional drawback duty on a substance known and described as "oil cake," exported in 1895 under the act of August 27, 1894 (28 Stat., 509, ch. 349), entitled "An act to reduce taxation and provide revenue for the Government, and for other purposes."

During the period between August 27, 1894, and May 1, 1897, certain cargoes of linseed were imported into the United States by appellant, and by other persons who transferred the same to appellant, the duties required by law being paid, namely, at the

rate of 20 cents per bushel of 56 pounds. (R. 53, 55; Findings III, IV, and XV.) Said linseed was then subjected, within the United States, to the customary practices of crushing and mulling for the purpose of extracting the oil therefrom. By this process there was extracted from each bushel of linseed, weighing 56 pounds, 19.19 pounds of oil and there remained 35.87 pounds of a substance known as "oil cake" and 0.22 of a pound of settlings or waste. (R. 55, 56; Findings XVI, XVII.)

The "oil cake" was subsequently exported by appellant in various lots and cargoes, and claims were presented to the collector of customs for drawback reimbursement under the provisions of section 22 of the act of Congress referred to (R. 53, 54; Findings VII, VIII.)

In the claims so presented it was contended that the duty of 20 cents per bushel of 56 pounds, less 1 per cent paid on the linseed should be divided between the oil and the "oil cake" in proportion to the respective *weights*. The collector of customs decided that under and by virtue of the law and regulations of the Treasury Department the duty paid on the linseed should be distributed to the oil and "oil cake" in proportion to their respective *values*, and the allowance was so made and paid.

From August 5, 1861, down to the present time the practice of the Treasury Department, where several articles are manufactured from the same imported material, has always been to calculate and to pay the

drawback by distributing the duty paid on the imported material between such articles in proportion to their *values*, and not in proportion to their *weights*, as well where the imported material paid a specific as where it paid an *ad valorem* duty. (R. 56; Finding XVII.)

The number of articles affected by the construction of the law allowing drawbacks where several articles are manufactured from one imported material is very great. Among them are castor oil and castor pomace, refined sugar and syrup which come from imported raw sugar, articles manufactured from tin plate, articles manufactured from wood, and many other articles. (R. 66; Finding XVIII.)

This suit is to recover the difference between what the exporter received according to the method employed by the Treasury Department, and what the exporter claimed it should have received according to its proposed method.

Contentions of the parties.

The contentions of the parties briefly stated are:

The appellant insists that the drawback duty should be divided beteen the oil seed and the oil cake in proportion to their respective *weights*.

The appellee contends that the drawback duty under the tariff law of 1894 should be divided between the oil and oil cake in proportion to their respective *values*.

ARGUMENT.

The drawback duty should be divided between the oil and the oil cake in proportion to their respective values.

The sole question involved in this case is whether where linseed on which a duty of 20 cents per bushel had been paid was manufactured into oil and oil cake, and the oil cake exported, the drawback under section 22 of the act of August 22, 1894, should be computed in proportion to the *value* which the oil cake bears to the oil or in proportion to the *weight* which the exported oil cake bears to the *weight* of the imported linseed?

Appellee maintains that the duty should be divided in proportion to their respective *values*.

The subject will be considered under the following heads:

1. The tariff law of 1894 and other tariff laws levying duties on linseed and providing for drawback duties on articles when exported, produced or manufactured from imported materials.

2. When there is doubt as to the meaning of the law the contemporaneous construction of those charged with its execution is conclusive.

3. The effect of legislative recognition of executive construction.

4. The method of the Treasury Department for apportionment of drawback duty the only practical method if oil cake was entitled to drawback.

5. The question involved decided by Treasury Department in 1862 not only as to oil cake but as to other commodities subject to drawback duty.

6. The underlying principle of a tariff law should be considered.

7. The precise question decided in favor of the Government by the Circuit Court of Appeals, second circuit. Application for certiorari denied.

I.

The tariff law of 1894 and other tariff laws levying duties on linseed imported and providing for drawback duties on articles when exported, produced, or manufactured from imported materials.

The act of August 24, 1894 (28 Stat. L. 509), imposes a duty on linseed imported into this country, in the following language:

> 206. Flaxseed or linseed, poppy seed, and other oil seeds specially provided for in this act, twenty cents per bushel of fifty-six pounds.

By the act of 1861 a similar duty was placed on linseed or flaxseed. In the tariff act of 1870 (16 Stat. L. 265) the following appears:

> On linseed or flaxseed, twenty cents per bushel of fifty-six pounds weight, provided that no drawback shall be allowed on oil cake made from imported seed.

The same paragraph appears in the tariff act of 1883 (22 Stat. L. 513).

In the act of 1890 (26 Stat. L. 586) the rate of duty is 30 cents instead of 20 cents per bushel. In all other respects this section remains the same as in the acts of 1870 and 1883.

As to drawback duties.

Section 22 of the tariff act of August 27, 1894 (28 Stat. 509–551, 552), reads as follows:

> SEC. 22. That where imported materials on which duties have been paid are used in the manufacture of articles manufactured or produced in the United States there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties: *Provided*, That when the articles exported are made in part from domestic materials the imported materials, or the parts of the articles made from such materials, shall so appear in the completed articles that the quantity or measure thereof may be ascertained: *And provided further*, That the drawback on any article allowed under existing law shall be continued at the rate herein provided. That the imported materials used in the manufacture or production of articles entitled to drawback of customs duties when exported shall, in all cases where drawback of duties paid on such materials is claimed, be identified, the quantity of such materials used and the amount of duties paid thereon shall be ascertained, the facts of the manufacture or production of such articles in the United States and their exportation therefrom shall be determined, and the drawback due thereon shall be paid to the manufacturer, producer, or exporter, to the agent of either, or to the person to whom such manufacturer, producer, ex-

> porter, or agent shall in writing order such drawback paid, under such regulations as the Secretary of the Treasury shall prescribe.

The act of August 6, 1861 (12 Stat. 293), contains a similar provision, as follows:

> SEC. 4. *And be it further enacted*, That from and after the passage of this act there shall be allowed on all articles wholly manufactured of materials imported, on which duties have been paid when exported, a drawback, equal in amount to the duty paid on such materials and no more, to be ascertained under such regulations as shall be prescribed by the Secretary of the Treasury: *Provided*, That ten per centum on the amount of all drawbacks so allowed shall be retained for the use of the United States by the collectors paying such drawbacks, respectively.

The above section of the act of 1861 appears in substantially the same language in the Revised Statutes, 1879, chapter 9, as section 3019. In the act of 1890 (McKinley bill) it appears as section 25, in precisely the same language. (26 Stat. 617.)

In other words, section 22 of the act of 1894 is a substantial reenactment of the law of 1861 and a verbatim reenactment of the law of 1890 on the question of drawback duty. Between 1870 and 1894 the law provided that no drawback should be paid on oil cake. The act of 1894 contained no provision prohibiting the payment of drawback on oil cake, and the

same is true as to the acts prior to 1870. The act of 1894 imposed a duty on linseed oil, as follows:

> 29. Flaxseed or linseed and poppy seed oil, raw, boiled, or oxidized, twenty cents per gallon of seven and one-half pounds weight. (28 Stat. 509.)

The above act is practically a reenactment of the statutes of 1861, 1870, 1883, and 1890. There is some difference in the rate in the acts of 1870 and 1890, but otherwise they are the same.

Two facts are apparent from the statutes above referred to and quoted: First, the duty imposed upon linseed or flaxseed imported from 1861 to 1894, inclusive, was practically the same, and the manner of levying the duty during the same period was precisely the same; second, the sections of the several tariff acts from 1861 to 1894, inclusive, providing for drawback duty on articles when exported, produced, or manufactured from imported materials, were substantially, if not precisely, the same. The fact that from 1870 to 1894 drawback duty was forbidden on oil cake does not change the principle involved. It was not forbidden on other commodities, such as sugar, wool, etc., wherein the same method was employed and the same principle was involved.

These facts are important in the light of the construction placed upon the several statutes by the executive, legislative, and judicial departments of the Government, as will more fully appear as the discussion of the subject proceeds.

II.

Where there is doubt as to the meaning of the law the contemporaneous construction of those charged with its execution is conclusive.

It was the established practice of the Treasury Department from 1861 to 1897—and the same practice has obtained from that date to the present time—in cases where several articles were manufactured from the same imported material, to calculate and pay drawback duty by distributing the duty paid on the imported material between such articles in proportion to their *values*, and not in proportion to their *weights*, as well where the imported material paid a specific as when it paid an ad valorem duty. (R. 56; Finding XVII.)

The appellee maintains that the law of 1894 was properly construed by the Treasury officials, and points to the fact that for 35 years substantially the same provisions have been construed and interpreted in the same way by those charged with the execution of the laws, as strong evidence of its proper interpretation. The appellant, on the other hand, contends that the construction placed upon the law by the officers in question was improper and unwarranted, and asks that the court so find. The most for which appellant can contend is that there is *doubt* as to the meaning of the law. This we deny; but if it were true, we submit it would be the duty of the court to follow the contemporaneous construction placed thereon by the Treasury officials, especially

in view of the fact that such construction has been universally adhered to for so long a period. In support of this proposition we direct attention to the following authorities:

In *Jacobs* v. *Prichard* (223 U. S. 200) the court held:

> The rule that where ambiguity exists courts will follow the construction placed on a statute by the department charged with its execution is strengthened where the statute itself (as in this case) directs such department to make the necessary regulations to carry it into effect.
>
> The Supreme Court of Wisconsin holds that a uniform construction by the department to which an act is referred for the carrying out of its provisions will be followed by the courts even when the courts would not have so construed the act in the first instance. (*Harrington* v. *Smith*, 28 Wisconsin 68.)

In *Edwards* v. *Derby* (12 Wheat. 206) the court held:

> In the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law and were appointed to carry the provisions into effect is entitled to very great respect.

A strong statement of the weight to be given to the uniform practice of the department is found in

United States v. *Philbrick* (120 U. S. 52), where the court held:

> A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight, and, since it is not clear that that construction was erroneous, it ought not now to be overturned.

In *The United States* v. *Hill* (120 U. S. 169) the court says:

> It has also had the sanction successively of the Department of the Treasury, the Department of the Interior, and the Department of Justice. Until this suit was brought it has never been called in question by any accounting officers of the Government, nor has Congress seen fit to put a stop to it by legislation. This construction of the statute in practice, concurred in by all the departments of the Government and continued for so many years, must be regarded as absolutely conclusive in its effects. (*Edwards' Lessee* v. *Derby*, 12 Wheat. 206; *United States* v. *Temple*, 105 U. S. 97; *Ruggles* v. *Illinois*, 108 U. S. 526; *United States* v. *Graham*, 110 U. S. 219.)

See also *United States* v. *Mayer* (12 Wall. 177); *Peabody* v. *Stark* (16 Wall. 240); *United States* v. *Healey* (160 U. S. 136–145); *United States* v. *Johnson* (124 U. S. 236); *United States* v. *G. Falk & Bro.* (204 U. S. 143); *Smythe* v. *Fiske* (23 Wall. 374); *United States* v. *Moore* (95 U. S. 760); *United States* v. *Pugh* (99 U. S. 265–269); and many other cases.

In view of the above decisions the conclusion is, it seems to us, irresistible that if it was the statute of 1861 that was under consideration, the court could not avoid interpreting said statute in accordance with the interpretation of the Treasury Department, because of the uniform, continuous, and contemporaneous construction of the statute in question by the officers charged with its execution. And there is still greater reason why subsequent statutes on the same subject should be so interpreted. This we will undertake to show under the next point.

In the present case the "imported materials" are the linseed. The articles manufactured are the cake and the oil. The total amount of the drawback is the amount of the duties paid on the materials.

The linseed is used in the making of the *cake*, and it is used in the making of the *oil*. Neither could be made unless the whole of the linseed was used. As no more can be paid on *both* products than the *one duty*, it must be divided between them in some way. The statute does not say in express terms that it shall be divided in proportion to weight or in proportion to value; and if there is any doubt as to what the statute means on this point, then all the authorities with respect to the effect of contemporaneous construction come into play.

III.

The effect of legislative recognition of executive construction.

The statute under consideration is that of 1894, and, as we have pointed out, section 22 of that act is a reenactment of section 4, chapter 45, of the act of 1861. It is also true that the provisions contained in the revision of 1870 and the tariff act of 1890 on the question of drawback duty on manufactured goods was practically the same as the law of 1861.

Many and various were the interests affected by the provisions in regard to drawbacks, and there is no doubt whatever that when Congress was considering the several acts above mentioned, and especially the act of 1894, that the uniform custom of the Treasury Department in construing the provisions of former acts was brought sharply to its attention. This being true, *we have a right to presume that when Congress passed the act of 1894 it did so with the full knowledge of the construction placed upon the same provisions in other acts by the Treasury Department and with the intention that the language employed should be construed in the same manner and with the same meaning as the provisions before mentioned had been construed.*

This principle was recognized and indorsed in *U. S.* v. *Bailey* (9 Pet. 238), wherein the court, speaking through Mr. Justice Story, says, on page 255:

> It may be added that it has been stated by the Attorney General and is of public notoriety that there has been a constant

practice and usage in the Treasury Department in claims against the United States, and especially of a nature like the present, to require evidence by affidavits in support of the claim, whether the same has been expressly required by statute or not, and that, occasionally, general regulations have been adopted in the Treasury Department for this purpose.

Congress must be presumed to have legislated under this known state of the laws and usage of the Treasury Department. (Italics ours.) The very circumstances that the Treasury Department had for a long period required solemn verifications of claims against the United States, under oath, as an appropriate means to secure the Government against frauds, without objection, is decisive to show that it was not deemed a usurpation of authority. The language of the act of 1823 should, then, be construed with reference to this usage.

This honorable court has decided unequivocally that the reenactment by Congress, without change, of a statute which had previously received long-continued executive construction is an adoption by Congress of such construction. Among other authorities in support of this proposition may be mentioned *United States* v. *Falk and Brother* (204 U. S. 143); *United States* v. *Cerecedo Hermanos y Compania* (209 U. S. 337); *United States* v. *Philbrick* (120 U. S. 52); *United States* v. *Whitridge* (197 U. S. 135); *Merchant's National Bank of Baltimore* v. *United States* (214 U. S. 33).

IV.

The method of the Treasury Department for apportionment of drawback duty the only practical method.

We have assumed in the foregoing discussion that there may have been some room for doubt as to the meaning of the law of 1861, at the time of its enactment, in regard to drawback duty on exported articles manufactured from imported materials, and that possibly the same, although with less force, may be claimed for the law of 1870. We have, however, tried to show that if such doubts existed they were removed by the uniform, contemporaneous, and long-continued construction placed upon said laws by the officers charged with their execution; and, further, *that the verbatum reenactment in 1894 of the law of 1890, which was a substantial reenactment of the statutes of 1870 and 1861, all of which had received contemporaneous executive construction to the same effect, was an adoption by Congress of such construction* as fully and completely as though the specific regulations adopted by the Secretary of the Treasury for ascertaining the amount of drawback due had been written into the law of 1894.

We shall now undertake to show that the method of the Treasury Department for apportioning the drawback between the two products was the only practical and rational method that could have been employed, and that it was the method contemplated by Congress in cases where only one of the two products resulting from the manufacture of imported

materials is exported; in a word, that the Treasury officials have been most liberal to exporters in the construction of the law.

The act of 1894 (28 Stat. L., 509) imposes the following duty:

> 206. Flaxseed or linseed, poppy seed, and other oil seeds not specifically provided for in this act, twenty cents per bushel of fifty-six pounds.

It is provided in section 22, heretofore quoted, that where imported materials on which duties have been paid are used in the manufacture of articles manufactured or produced in the United States "there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties." The imported material in the case at bar was "linseed," and by the manipulation of this material two distinct products, or, more properly speaking, one product and a by-product, resulted, namely, oil and oil cake. If *both* of these products were exported, there would be no difficulty in arriving at the amount of drawback to be paid, and this, we submit, is the fair and reasonable construction to place upon the language employed. It is the view taken by the court in *Campbell* v. *U. S.* (107 U. S. 407).

This view is strengthened by the consideration of the provision in section 22 immediately following that stated above, to wit:

> That when the articles exported are made in part from domestic materials and imported

materials, or the parts of the articles made from such materials shall so appear in the completed articles, that the quantity or measure thereof may be ascertained.

Why the difference in the treatment by Congress of these two matters? The answer is, either because it was not contemplated that any duty should be subject to drawback unless all of the articles produced from imported materials should be exported, which subject will be considered under another head, or because the method of apportioning the duty, in the event of the exportation of a portion only of the articles so produced, should be determined by the Secretary of the Treasury. As we have seen, it has been held by the Treasury Department that, under the conditions above mentioned, exporters are entitled to a rebate in the way of drawback. In placing this construction upon the law the department, we think, has exhibited the utmost liberality toward exporters.

The last paragraph of section 22 specifies a number of things that shall be done by the Secretary of the Treasury, to wit:

(1) The imported materials used in the production of articles entitled to drawback of duties when exported shall be identified.

(2) The quantity of such materials used and the amount of duties paid thereon shall be ascertained.

(3) The facts of the manufacture or production of such articles in the United States, and their exportation therefrom, shall be determined.

(4) The drawback due thereon shall be paid. All of which shall be done "*under such regulations as the Secretary of the Treasury shall prescribe.*"

While the statute is very explicit in the requirements of what shall be done before the drawback shall be paid over to the exporter, it is silent as to the question of *how* the drawback duty shall be *divided* where the single imported material produced two or more different products. Nothing is said either about weight or value, but the question is to be determined under such regulations as the Secretary of the Treasury shall prescribe. This is certainly the reasonable and rational interpretation of the statute. The Congress, it seems to us, acted with great wisdom in referring to that officer the determination of this question. The Secretary of the Treasury, so familiar with the customs laws and their construction, is not likely to prescribe regulations that would work an injustice either to the exporter or the United States. If, however, unreasonable regulations should be prescribed, it may be the courts would intervene. In any event, the error, if one existed, could very readily be cured by congressional action at any time. That the regulations of the Treasury Department on the subject under consideration are not unreasonable or unjust is evident from the fact that, although *they have been in operation since*

1861, no effort has been made to change them by legislation, and they have been upheld by the courts.

In *Campbell* v. *The United States, supra*, the exporters' claim for drawback provided by the similar act of 1861 on oil cake produced from imported linseed, and wherein the regulations of the Treasury Department for the ascertainment of the amount due were substantially the same as those in force in 1895, the court says, in substance, that if the regulations prescribed of themselves were of such a character as to defeat totally the right which Congress had granted, no court would hesitate to hold them invalid as being unreasonable, and continued as follows:

> But the *regulations in this case are not unreasonable, nor do they interpose any obstacle to the full assertion and adjustment of plaintiffs' right.* It is the order of the Secretary of the Treasury, forbidding the collector to proceed under these regulations or in any other mode, which is the real obstacle. Is that order a defense to this action? Can the Secretary, by this order, do what he could not do by regulations—repeal or annul the law? Can he thus defeat the law he was appointed to execute by making regulations, and then, by ordering his officers not to act under them and not to act at all, place himself above the law and defy it?

It is plain that the court in deciding this case assumed that the *distribution of the drawback* was

for the Secretary of the Treasury to regulate. This is apparent from what the court, on page 411, says:

> The finding of the court is that, by the regulations, this allowance of drawback had been fixed at 17 cents per hundred pounds. The act of Congress having declared that on exportation there shall be allowed a drawback equal in amount to the duty paid on such material, and the Secretary having established by a regulation that, as regarded the cake resulting from the manufacture of the linseed into oil and cake, the latter represents at 17 cents per hundred pounds the duty on the imported seed so converted into cake, there resulted a contract that when exported the Government would refund, repay, pay back, this amount as a drawback to the importer.

The justice of the method prescribed by the Secretary of the Treasury and the injustice of the method suggested by the appellant are so apparent from a comparison of the results obtained when tested as to leave no doubt as to the meaning of the statute and the intention of Congress when the law was enacted. (R. 56–66; F. XVII.) This will appear from the following simple illustration:

Drawback according to relative values.

1 bushel of seed of 56 pounds { 19.91 pounds of oil or 2.654 gallons. 35.87 pounds of oil cake.	
Oil worth 55 cents per gallon of 7½ pounds.	
Oil cake worth $27.45 per ton of 2,000 pounds.	
From 1 bushel of seed there is produced oil valued at	$1.46
And oil cake valued at	.49
Total	1.95

The duty paid on imported seed is 20 cents per bushel.

$\frac{1.46}{1.95}$ of $\frac{20}{1}$=drawback on oil	$0.1497+
$\frac{.49}{1.95}$ of $\frac{20}{1}$=drawback on oil cake	.0502+
Total	.1999

Drawback according to weight.

19.91 pounds of oil at $\frac{4}{7}$ of 1 cent per pound	$0.072
35.87 pounds of oil cake at $\frac{4}{7}$ of 1 cent per pound	.128

SUMMARY.

By relative values:	
Oil	$0.1497
Oil cake	.0502
By weight:	
Oil	.072
Oil cake produced from 1 bushel of seed	.128

In short, according to the plan suggested by appellant, the oil cake, which is of little value, made from a bushel of seed would be entitled to a drawback of approximately 13 cents, and the oil, the principal product and of far greater value, would be entitled to about 7 cents. By the plan of the Treasury Department, the oil cake made from a bushel of seed would be entitled to approximately 5 cents and the oil about 15 cents, their true relative values.

V.

The question involved decided by the Treasury Department in 1862 not only as to oil cake but as to other commodities subject to drawback duty.

On the 22d of January, 1862, circular instructions were issued regulating the amount of drawback to be allowed on a large number of different substances, like linseed oil and oil cake, which

resulted from some single substance like linseed. In all the cases the amount of the drawback was fixed in proportion to the *value* of the commodities. (R. 56–66; Findings XVII, XVIII.)

It is apparent from the facts set forth in this finding that the same question involved in this case was up for consideration in the early sixties, and it is equally apparent that the question was then settled, and that ever since a drawback has been authorized by law that the method employed by the Treasury Department under the regulation of 1895 has been in full force and effect. As heretofore stated, the same method is employed with reference to other commodities, and this has been the custom since the first enactment of the law providing for such drawback duty. For example, it is shown by Finding XVII (R. 56) that immediately after the law of 1861 went into effect the Treasury Department communicated with the collector with reference to a number of imports from which various substances were manufactured. The first substance taken up appears, by the letter of October 19, 1861, from the collector to the Secretary of the Treasury, to have been sugar. The question of what drawback should be allowed on the different manufactures of raw sugar was stated to be one arising under section 4 of the law of 1861, allowing a drawback on "all articles wholly manufactured from materials imported." The collector made very full investigation among the different refineries, and in his letter states what from the

figures he obtained should be the drawback on the different sorts of sugar, crystalline, soft white, and syrup of sugar. The distribution was in proportion to the *value* of these different substances. In a letter dated November 2, 1861, oil cake and linseed oil were mentioned. The letter of November 5, 1861, from the collector to the Secretary of the Treasury is devoted entirely to the subject of linseed oil and oil cake, and the formulas are there laid down which practically are followed in the Treasury Regulations governing this case. *From a letter to the Treasury Department of December 30, 1861, it appears that the precise question which is raised in this action was raised by the importers of that day, and that the regulations of the Treasury Department were continued after the claim of exporters had been fully brought before the the department.*

VI.

The underlying principle of a tariff law should be considered.

In the construction of a tariff law it is eminently proper to consider the general principle or principles underlying the law. In *Arnold* v. *The United States* (147 U. S. 494–497) the court says: "The idea which runs through this statute (act of 1890) is well known to be that of protection to our manufacturers." And the same is true of other tariff acts, among which may be mentioned, for example, the act of 1897. On the other hand, the dominant

idea running through the tariff act of 1894 (Wilson bill) was that of revenue, with incidental protection. Applying this principle to the subject under consideration, the purposes of the law may be said to be, primarily, for the production of revenue; and, secondly, to afford protection to the American manufacturers and growers of linseed. These facts, we submit, should not be lost sight of, and no construction should be placed upon the act in general, or upon any section thereof, that would result in either defeating the purposes of the law or doing violence to the principles involved. The construction for which the appellant contends would, in a large measure at least, do these very things, which will appear from a further discussion of the subject.

It will not do to say that because of the drawback provision the revenue theory of the law is either destroyed or impaired, for in the cases at bar the principal and valuable product of the imported seed is not exported, but is sold in the markets of this country, and only the by-product, of comparatively little value, is exported. The primary object of the law to provide revenue is therefore just as potent as if the act contained no provision for drawback of duties. It must be remembered that the law of 1894 levied a duty of 20 cents per gallon on linseed oil imported into this country. The importers doubtless considered this a heavy duty, and their first thought was to ascertain whether or not there was any provision in the law that would, indirectly, operate to reduce this duty. They turned,

of course, to section 22, providing for drawback, and placed a construction thereon which, if upheld, would relieve them of almost all the duty levied upon oil. Instead of importing the oil, they, as in these cases, imported the oil seed and manufactured therefrom the oil, by which process the oil cake resulted. The oil cake was exported and the oil sold in the markets of this country.

The original object—to wit, the getting of oil into the United States at low duty—was accomplished. According to appellant's method of apportionment of the drawback, the duty on oil would be about 3 cents per gallon, instead of 20 cents, as provided by paragraph 29. This is apparent from the fact that 1 bushel of seed, on which there is a duty of 20 cents, produced about 2.6 gallons of oil and a quantity of oil cake. The oil cake when exported would under their method draw back 13 cents, leaving about 7 cents, representing the duty on oil produced from 1 bushel of seed. That a very large proportion of this difference between 3 and 20 cents would inure to the benefit of the importers there is no question, and it logically follows that the Government would be greatly damaged thereby. It is as clear and plain as anything can be that the sole object in exporting the oil cake was tc secure the drawback of duties. The oil cake was of little value and could have been disposed of here as well as abroad for cattle feed, the only use to which it could be put; but it was heavy and bulky, and if the drawback was apportioned according to weight it would earn

about 33 per cent of its market value by being exported. *That such a construction as this, which would practically defeat the object of the law and violate the cardinal principles underlying the tariff act in question, can be indorsed is inconceivable.*

It is clearly apparent that one of the purposes of the drawback provision, when applied to this commodity, was to benefit the American manufacturer of oil who found a market in foreign countries for the product of the oil seed imported into and manufactured in this country, and not to benefit the American manufacturer who retained the principal product of the imported materials and exported only the by-product. In other words, the purpose of the law was to place the American manufacturer of linseed oil from imported seed, when exported, upon practically an equal footing with the foreign manufacturer in foreign markets. This is the construction placed upon the provision by the Supreme Court in *Campbell* v. *The United States, supra* (p. 413), wherein the court held, in substance, that the purpose of the drawback provision was to *make duty free imports which are manufactured and then returned immediately to the country from whence they were imported or to some other foreign country.* So also in *Tidewater Oil Co.* v. *The United States* (171 U. S. 210, 216) the court, in considering section 3019, Revised Statutes, which is the same as section 22, say:

> The object of the section was evidently not only to build up an export trade, but to

encourage manufacturers in this country where such manufacturers were intended for exportation by granting a rebate of duties upon the raw or prepared materials imported, and thus enable the manufacturer to compete in foreign markets with the same articles manufactured in other countries. In determining whether the articles in question were wholly manufactured in the United States, this object should be borne steadily in mind.

These decisions are quoted with approval in *Swan and Finch Co.* v. *U. S.* (190 U. S. 143, 146).

VII.

The precise question decided in favor of the Government by the Circuit Court of Appeals, Second Circuit—Application for certiorari denied.

The precise question involved in this case—i. e., the construction of section 22 of the tariff act of 1894—was decided in favor of the Government in the case of the *United States* v. *The Dean Linseed Oil Company* by the Circuit Court of Appeals of the Second Circuit (87 Fed. 453). The petitioner made application for writ of certiorari, which was denied by the Supreme Court, the decision being announced without an opinion. (172 U. S. 647.)

This case was originally brought in United States Circuit Court for the Eastern District of New York by the Dean Linseed Oil Company to recover drawback on account of exported oil cake manufactured from seed imported into this country under the act of 1894, and the court held that drawback should

be proportioned according to the weight of the oil cake and not according to the relative values of the two products (78 Fed. 467). On appeal the decision of the lower court was reversed, as before stated. Upon the decision of the Circuit Court, together with the dissenting opinion of Wheeler, J., of the Court of Appeals, the learned counsel for appellant in this case largely depends for authority to sustain their contention.

In rendering its decision reversing that of the Circuit Court, the Court of Appeals, through Shipman, J., gave a clear and concise statement of the law as we understand it, and which we submit is conclusive.

It thus appears from the record that the contention now made by appellant as to the construction of this drawback provision was first made in 1861 (R. 63) by persons then in like position. The act of 1861 contained the exact words now relied upon by appellant, "a drawback *equal in amount* to the duties paid on such materials * * *;" and it was then decided, and regulations accordingly promulgated, that the drawback should be graduated by the value of the manufactured product. In the case of linseed oil cake this was fixed at approximately 17 cents per 100 pounds. This ruling was acquiesced in by importers and was pronounced reasonable by this court in the case of *Campbell* v. *United States* (107 U. S. 407).

The regulation under the drawback statute has been continued since 1861 to the present time, the

statute being reenacted in almost identical terms in 1870, 1890, and 1894. It has been continuously in force. Between 1870 and 1894 the law specifically provided that no drawback should be allowed on oil cake, but the general drawback statute and the regulation complained of were in force during this period; and Congress in 1894, when it again legislated upon this subject, having full knowledge of the regulation in existence since 1861, reenacted the drawback statute, and by omitting the prohibition against drawback on oil cake allowed it to receive the drawback as formerly. In 1897 the exact contention made in 1861 was relied upon in the case of *Dean Linseed Oil Company* v. *United States* (78 Fed. 467), was upheld by the district court, and denied on appeal (*United States* v. *Dean Linseed Oil Company*, 87 U. S. 453). Application for certiorari was denied by this court December 5, 1898 (172 U. S. 647), since which date Congress has made no change in this statute. The present case, again asserting the contention that the drawback should be graduated by weight instead of value, was filed August 7, 1901. It is thus apparent that the construction of this statute and the reasonable regulation thereunder have been in effect for over half a century; where questioned have been approved by the courts; and by constant reenactment and failure to make any change must be held to have been approved by Congress, and the question no longer open (*Hahn* v. *United States*, 107 U. S. 402, 406).

CONCLUSION.

In conclusion we ask, in view of the facts as found by the court and the law applicable thereto, that the decision of the lower court be affirmed.

FRANK DAVIS, JR.,
Assistant Attorney General.

CHAS. F. JONES,
Attorney.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 123.

NATIONAL LEAD COMPANY, APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

ON APPEAL FROM THE COURT OF CLAIMS.

ALEX. BRITTON,
EVANS BROWNE,
F. W. CLEMENTS,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 123.

NATIONAL LEAD COMPANY

vs.

THE UNITED STATES.

Statement.

This cause comes by appeal from a final judgment of the Court of Claims, dismissing the petition of The National Lead Company.

The petition and findings of fact of the Court of Claims show that appellant imported from foreign countries into the United States about 985,835 bushels of linseed, upon which it paid duty in the sum of $191,442.34, being at the rate of twenty cents per bushel of fifty-six pounds (Findings III, IV, V, and VI).

The duty so paid was in accord with paragraph 206 of the act of August 27, 1894 (28 Stat., 509), reading:

> "Flaxseed or linseed, poppy seed, and other oil "seeds, not specially provided for in this act, twenty "cents per bushel of fifty-six pounds."

and was in express terms a *specific* and not an *ad valorem* duty.

By section 22 of the same act it was provided:

> "That where imported materials on which duties "have been paid are used in the manufacture of arti- "cles manufactured or produced in the United States, "there shall be allowed on the exportation of such "articles a drawback equal in amount to the duties "paid on the materials used less one per centum of "such duties: *Provided,* That when the articles ex- "ported are made in part from domestic materials "the imported materials or parts of the articles made "from such materials, shall so appear in the com- "pleted articles that the *quantity* or measure thereof "may be ascertained: *And provided further,* That the "drawback on any article allowed under existing law "shall be continued at the rate herein provided."

By means of a process duly stated, appellant manufactured the linseed so imported into linseed oil and linseed cake, exporting the cake, which amounted to about 635,723 bushels of fifty-six pounds each (Findings VII and IX, pages 53 and 54).

In the process of manufacture, of the matter composing each bushel of seed weighing 56 pounds, 35.87 pounds appeared in the cake and 19.91 pounds appeared in the oil (Finding XVI, page 56).

Upon such exportation, appellant filed claims for drawback on the basis of twenty cents per bushel, less one per centum on 635,723 bushels, or $125,873.32.

Under instructions from the Secretary of the Treasury, the customs officials computed the drawback upon the basis of the *relative value* of the goods exported and applying a formula set forth, making the value of one bushel of seed ($1.62) of which in the manufacture $1.46 is the value of the oil and forty-nine cents the value of the cake. Under this formula, based on value and not on weight, they fixed the duty paid on the 35.87 pounds of linseed cake in each

bushel at five cents and on the 19.91 pounds of oil at fifteen cents.

The difference in the two methods of computation is $89,162.04, for which amount the company sued.

Upon the facts found the Court of Claims, without opinion, dismissed the petition, and in so doing error is assigned:

I.

In concluding as a matter of law from the facts found that appellant is not entitled to recover.

II.

In adopting the decision in United States *vs.* The Dean Linseed Oil Company, 87 Fed. Rep., 453, as authority for its action.

III.

In holding that appellant was not entitled to drawback upon the weight of material exported and at the rate paid on the importation of the material.

IV.

In applying a valuation basis for drawback upon material on which a specific duty had been paid.

V.

In dismissing appellant's petition.

ARGUMENT.

I.

It will appear from the record and the above statement that but one question of law is presented for decision, viz., what amount is equal to the duties paid on the material used in the manufacture of oil-cake, and this amount is determined by the conclusion whether the drawback should be figured upon the value of the material or upon its weight.

The tariff act of August 27, 1894 (28 Stats., 509), imposes the following duty:

> "206. Flaxseed or linseed, poppy seed, *and other "oil seeds,* not specially provided for in this act, "twenty cents per bushel of fifty-six pounds."

levying, in express terms, a *specific* duty upon linseed.

The act further directly contemplates the payment of a specific drawback, for the reason that it directs (section 22) that *the amount of the imported materials contained in the exported article* shall be ascertained, and a drawback equal in amount to the duties *paid* shall be allowed. In other words, it directs that the proper Government officials estimate *how much* of the imported material is used in the exported article.

The duty was levied on a certain "quantity" of seed, viz., a bushel of fifty-six pounds. The drawback by the statute is allowed on the "quantity" of the imported material used in the exported article. In both instances the rule which governed the computation was that of "quantity" and not of "quality." Neither the duty nor the drawback was to be computed on an *ad valorem* basis.

Fifty-six pounds of linseed are imported. The duty is levied on that quantity at 20 cents, or 5/14 cent per pound.

The drawback on the article exported is allowed upon the

"quantity" of the imported article contained therein. Now, on exportation, the 56 pounds upon which duty was paid has been reduced to 35.87 pounds; that amount is exactly the "quantity" of the imported material used in the exported article. The duty was 5/14 cent per pound on each of the 56 pounds; the drawback, therefore, ought to be 5/14 (less 1 per centum) per pound on each of the 35.87 pounds. The 35.87 pounds was part of the quantity of 56 pounds which came into this country, and it is clear that the 35.87 pounds is that "quantity" which has been taken from the original 56 pounds and is now being sent out of this country.

It cannot be successfully claimed that the wording of the statute "under such regulations as the Secretary of the Treasury shall prescribe" authorizes that officer to ascertain anything but the expressly stated "quantity" of the imported materials used. A statute which directs that a "quantity" be ascertained cannot be understood as directing that a "value" be ascertained. The only inquiry which the statute permits is as to the "quantity" of the imported material in the exported article and the duty originally paid thereon.

The terms "quantity" and "value" are far from being synonymous. The former, as used in the statute, refers to the size, bulk, or weight of the material, more especially the weight, as the duty which the statute levied was on a quantity of 56 pounds. The subject of the tariff was a bushel, or a standard bulk of fifty-six pounds weight, most certainly *a quantity* of fifty-six pounds weight. The tax was levied on fifty-six pounds of seed; it was not a tax on $1.62 worth of seed as fixed by the Treasury Regulations (*infra*), and hence not a tax on $1.62 worth of oil and oil-cake material unseparated.

The quantity imported was a *weight quantity;* the quantity exported, being part of that imported, must necessarily have been a weight quantity.

The purpose of the drawback provision is to make "duty

free imports which are manufactured here and then returned" to some foreign country (Campbell *vs.* U. S., 107 U. S., 407). Oil-cake is a manufacture, of value, from an imported material (Campbell *vs.* U. S., *supra*), is returned to some foreign country, and hence should be made "duty free." The duty paid on it, as such a separate manufacture, has not been determined, although a duty has been collected. Only one material or article has been imported, on which a single and not a proportionate duty has been levied and paid. Fifty-six pounds of material have been imported; thirty-seven and a fraction pounds of that material are exported; a single duty was paid on the importation of that fifty-six pounds of material, paid according to the actual weight of that material, and yet when 35.87 pounds of that actual weight are exported the defendant offers to refund a *proportionate value* drawback on a quantity, upon the importation of which a single and inseparable tax was levied and collected.

The purpose of the drawback provision to admit "duty free" cannot be accomplished unless the duty paid be accurately ascertained. This oil-cake was imported in the form of seed and a specific duty was levied on the seed. No proportionate duty was levied on the oil and cake as then contained in the seed; they were the component parts of the seed. The duty was on the seed as a weight, bulk, or quantity, and hence was likewise on the oil and cake as a weight, bulk, or quantity. No more duty was paid on the oil than on the cake—no proportionate value, no proportionate quantity was then ascertained. The material imported was treated as the statute directed it should be treated, a bulk of a standard measure, weighing a certain number of pounds. The fifty-six pound bushel of seed was the subject of the specific duty of 20 cents a pound; it was not taxed as so many pounds of oil and so many pounds of cake at 20 cents a pound; there was no thought of proportion. Nevertheless, when the claimant attempts to export 35.87 pounds of oil-

cake, upon the importation of which he paid this defendant 5/14 cents for each and every pound, he is required, under the regulations, to receive as a drawback on each pound an amount proportionate to the value of the cake to the oil. The "quantity" of the imported material in the exported product is utterly disregarded and a "relative value" arbitrarily substituted. It is impossible to admit oil cake "duty free" if upon its admission a tax of 5/14 cents per pound on 35.87 pounds, or 13.52 cents, is levied and collected, and upon its exportation there is a refusal to allow a drawback of more than about one-third of that amount, and this in the very face of a statute which *directs* that the drawback shall be allowed upon the "quantity" composing the exported material. In other words, while collecting a duty of 7.11 cents on 19.91 pounds of oil, a refund or drawback of over twice that amount would be allowed upon the exportation of those same 19.91 pounds, when, under the quantity rule of the statute, it could not be considered as other than 19.91 pounds of the 56 pounds of imported material.

"How much" of the imported material was contained in the exported article? Exactly 35.87 pounds. What was the specific duty paid on those 35.87 pounds when imported? The sum of 13.5 cents. How, then, can it be said, the purpose of the act being to admit those 35.87 pounds "duty free," that by the refund of but a fraction of the 13.5 cents duty the statute is satisfied?

We submit, that under the decision below no compliance was had with the express requirement of the statute as to the "quantity" of the imported material contained in the exported article, but that the "proportional values" were arbitrarily ascertained in plain violation of the statute.

The "material used" in the manufacture of this cake was the solid or unexpressed part of the seed, the remainder or fluid or expressed part of the seed being the oil material and settlings or waste. It is found by the Department that *of the matter composing each bushel of seed, weighing* 56 *pounds,*

35.87 *pounds appeared in the cake and* 19.91 *pounds appeared in the oil;* that is, the quantity of material used in the manufacture of the exported cake was a portion weighing 35.87 pounds of each bushel of seed which was subjected to the mulling process. We have, therefore, all the data required for a mathematical solution of the question: What amount is equal to the duties paid on the materials used? The amount equal to the duties paid on the cake material in each bushel of seed weighing 56 pounds must be such part of the duty paid on the 56 pounds of seed as 35.87 is of 56, and it cannot possibly be anything else; and the drawback must be 99 per cent of

$$\frac{20 \text{ (cents)} \times 35.87 \text{ (pounds)}}{56 \text{ (pounds)}}$$

The statute says:

> "There shall be allowed * * * a drawback "*equal in amount to* the duties paid on the materials "used, less one per centum of such duties."

Given the quantity by weight of imported materials used in making the exported article, and given the fact that a specific duty by weight has been imposed on the imported article containing those materials, it is manifest that there has been paid on every weight unit of those materials contained in the exported article precisely the same amount of duty which was paid on every weight unit of the imported article, however the *matter* composing the imported article be regarded, whether combined in the form or condition in which it was imported or separated into the different forms or conditions in which it subsequently appears. *Every pound of the imported article pays the same duty as every other pound. A pound of cake material in the seed pays the same duty as a pound of oil material in the seed, and each pays the same duty on a pound of seed.* A duty of 20 cents

per bushel of 56 pounds being paid on imported linseed, and 35.87 pounds on the *matter* composing that seed being used in the manufacture of exported cake, it must be that the duty paid on those 35.87 pounds is such part of 20 cents as 35.87 is of 56; that is x: = 35.87: 56, or (what is the same thing in the simplest form), as the 56 pounds of seed paid 20 cents duty, each pound paid 20/56 of a cent; and, as 35.87 of those pounds appear in the cake, the duty paid on the materials used in making the cake must be equal to 20/56 cents x 35.87.

The drawback statute contains no warrant for the consideration of values. It provides simply that the drawback to be allowed shall be "equal in amount to the duties paid on the materials used, less one per centum of such duties." *Where the duties are specific, a computation based upon values must necessarily lead to a result not equal in amount to the duties paid on the materials used,* and must, therefore, be in conflict with the statute.

The way in which the Treasury officials reach their result and as applied by the lower court, is shown by the Secretary's regulation of March 29, 1895, which is as follows:

TREASURY REGULATION.

(15807.)

Drawback on Oil Cake.

TREASURY DEPARTMENT, March 29, 1895.

SIR: On the exportation of linseed oil expressed from seed imported under the act of August 28, 1894, and of "oil cake" composed of the solid substance of such seed, the refuse matter in the seed, and a small percentage of oil not recoverable, the parts of the seed and the refuse being separated by the process of crushing, steaming, and pressing, drawback will be allowed equal in amount to the duties paid on the materials used in the manufacture, less the legal deduction of 1 per cent.

In determining the relative quantities and *values* of materials used in the manufacture of the oil and "oil cake" respectively, upon which allowance of drawback may be based, there shall be taken for each bushel (56 pounds) of imported seed 19 91/100 pounds (2 654/1000 gallons) of oil, and 35 87/100 pounds of "oil cake."

The manufacturer's and exporter's declaration on the drawback entry shall show the cost of the seed used per bushel (56 pounds), and the wholesale market values of the oil and "oil cake" at the place of manufacture at the time of exportation; and such values, after verification, shall be taken in connection with the relative quantities above specified as the basis of liquidation.

The following statement and formula will illustrate the method of determining the rate of drawback allowance in each case:

Assuming that the respective *values* of imported seed, oil and "oil cake" (as has been found by taking their average values at the principal factories of the United States during the eight years prior to October 1, 1894) are, for seed, $1.62 per bushel of 56 pounds; for oil, 55 cents per gallon of 7½ pounds, and for "oil cake," $27.45 per ton of 2,000 pounds; and, assuming, further, that such values are correct when applied to a given exportation, the following results appear:

$\frac{19\ 91}{100}$ pounds $= \frac{2\ 654}{1{,}000}$ gallons oil, at 55 cents		$1.46
$\frac{35\ 87}{100}$ pounds "Oil cake," at $27.45 per $\frac{\text{pound}}{2{,}000}$		.49
Value of oil and "oil cake" from one bushel seed		$1.95

In these quantities and values the following relations of proportion are manifest:

Value of oil and "oil cake."	Value of oil.	Value of material for oil and "oil case," 56 pounds seed.	Value of material for oil.
$1.95 :	: $1.46 : :	$1.62 :	$1.213

	Value of "oil cake."		Value of material for "oil cake."
$1.95 :	: $0.49 : :	$1.62 :	$0.407

Value of material for oil and "oil cake."	Value of material for oil.	Duty on material for oil and "oil cake," 56 pounds seed.	Duty on material for oil.
$1.62	$1.213 : :	. .20 :	.15 :

	Value of material for "oil cake."		Duty on material for "oil cake."
$1.62	: 0.407 : :	.20 :	.05

Duty on material for oil in 56 lbs. seed. } —15 cents—
Oil from 56 lbs. seed) —2,654 gallons.

$$\left\{ \frac{\text{Drawback on oil per gallon, cents.}}{\frac{5 \quad 65}{100}} \right.$$

Weight of "Oil Cake" from 1 bushel seed.	Duty on material for 35.87 pounds of "Oil Cake."	Drawback on 100 pounds "Oil Cake."
35.87 pounds. : 100 : :	5 cents.	13.94, say 14 cts.

The specific rates of drawback on oil and "oil cake" covered by each entry shall be determined by use of the quantities of oil and "oil cake" produced from one bushel of seed, hereinbefore fixed, and by substituting for the values of seed, oil, and "oil cake" used in the foregoing formula the verified values of such seed, oil, and "oil cake" declared in the drawback entry, as hereinbefore provided.

SUMMARY.

Fixed products of 1 bushel (56 pounds) seed:

19.91 pounds (2 654 gallons) oil.

1000

35.87 pounds oil cake.
Duty on 1 bushel (56 pounds) of seed, 20 cents.

To be Declared on Drawback Entry and Verified by Collector.

Value of seed per bushel (56 lbs.) — Represent the same by S.
Value of oil per gallon (7½ lbs.) — Represent the same by A.
Value of cake per ton (2,000 lbs.) — Represent the same by B.

Then—

A × 2.654 = { Value of oil product of 1 bushel of seed. } Represent the same by O.

B × 35.87 = { Value of cake product of 1 bushel seed. } Represent the same by C.

Value of oil and cake product of 1 bushel seed = O × C.

Hence:

O × C : O : : S : { Value of material for oil product of 1 bushel seed. } Represent the same by M.

S : M : : 20 cents { Duty on material for oil product of 1 bushel seed. } Represent the same by D.

20 cents—D = { Duty on material for cake product of 1 bushel seed. } Represent the same by DD.

Let X = Duty on material for 1 gallon of oil.
Let Y = Duty on material for 100 pounds of cake.

Then—

$$X = \frac{D}{2.654} \quad \text{and} \quad Y = \frac{DD \times 100.}{35.87}$$

Respectfully yours,
(6465 g.)

CHARLES S. HAMLIN,
Acting Secretary.

Collector of Customs, New York.

This regulation is difficult to read understandingly (1) because of the abstract phraseology employed; (2) because the quantity, 35.87 pounds, is used confusedly to indicate cake material in the seed as imported, and cake product after manufacture, and the quantity, 19.91 pounds, is used confusedly to indicate oil material in the seed as imported and oil product after manufacture, and (3) because formulas for ascertaining the drawback on oil are worked out simultaneously with the formulas for ascertaining the drawback on cake. It is assumed that the precise thing to which the statutory phrase "materials used" applies is not the whole of the seed which is submitted to the manufacturing process, but that portion thereof which appears in the cake product, and it is assumed that the measure or quantity of that portion of the seed is 35.87 pounds per bushel of 56 pounds. Down to this point the exporter and the Treasury officials travel together in entire agreement. They part on the question, What amount is equal to the duties paid on the 35.87 pounds of material used?

That question, the exporter says, on the assumed data can have only one correct answer because of the manifest fact that all parts of the seed paid the same amount of duties per weight unit—20/56 of a cent per pound—if a pound be taken as the weight unit.

The Treasury officials, on the other hand, hold that additional data are required, namely: The value of one bushel of seed ($1.62), and the value of the cake ($0.49), and of the oil ($1.46) from one bushel of seed, and they solve the question—what amount is equal to the duties paid on the 35.87 pounds of material used in the manufacture of the cake from one bushel of seed?—by means of two proportions, as follows:

First Proportion.

Value of oil and oil cake (from one bushel of seed).	Value of oil cake (from one bushel of seed).	Value of material for oil and oil cake, 56 lbs. seed (one bushel).	Value of material for oil cake.
$1.95 :	$0.49 : :	$1.62 :	$0.407

This proportion is used solely for the purpose of ascertaining the value ($0.407) of the 35.87 pounds of cake material in a bushel of seed, which is required so as to give three known terms in the second proportion and make it solvable.

Second Proportion.

Value of material for oil and oil cake, i. e., one bushel of seed.	Value of material for oil cake (in one bushel of seed), as ascertained by means of the first proportion.	Duty on material for oil and oil cake, 56 lbs. seed (or one bushel).	Duty on material for oil cake (in one bushel of seed).
$1.62	: $0.407 : :	.20 :	.05

That is to say, the principle upon which the regulation is based is that the ratio between the value of one bushel of seed ("material for oil and oil cake") and the value of the cake material in the bushel of seed ("material for oil cake") is equal to the ratio between the duty paid on the bushel of seed and the duty on the cake material in the bushel of seed.

And they solve the question—what amount is equal to the duties paid on the 19.91 pounds of material used in the manufacture of the oil from one bushel of seed?—by two similar proportions.

Thus the result is reached that five cents was the duty paid on the 35.87 pounds of cake material in the bushel of seed, and 15 cents was the duty paid on the 19.91 pounds of oil material in the seed. In other words, it is found that the duty paid on one part of the seed was at the rate of 5/35.87, or about 1/7 of a cent per pound, while the duty paid on another part of the seed was at the rate of 15/19.91, or about ¾ of a cent per pound.

This result conflicts with the self-evident fact that the duty paid on any one weight unit of the imported seed was equal to the duty paid on each and every other weight unit thereof, and it shows that the Treasury officials in using the formulas of the regulation violated the statute, and that the Secretary of the Treasury in prescribing those formulas usurped the functions of Congress.

II.

The statute is clear, in that it is intended that the drawback allowed should be equal to the duty paid on the materials used in the manufactured article, meaning thereby that if the *duty* was paid on the weight of the material the drawback should be paid upon the weight. That the officers of the Government gave a different construction to the law is not controlling; the statute was one for the purpose of providing revenue for the Government, and the officers charged with its administration would unquestionably, in good faith, solve any doubtful construction of the act in favor of its purpose. Aside from this presumption, which we submit with the greatest respect and earnestness, the construction of the act by the Treasury Department cannot change its intent and purpose so far as the method of computation of the drawback is concerned.

In *Campbell vs. The United States* (107 U. S., 407) an exporter's claim for the drawback given by the similar act of 1861 on cake produced from imported linseed was sustained.

There was no question as to the amount or mode of computing the drawback, but it was urged that no right as against the United States accrued till all the Secretary's regulations were complied with, and that as he ordered the proceedings in the custom-house stopped before the issuance of drawback certificates by the collector, the suit could not be maintained.

In disposing of this argument the Supreme Court says (page 410):

> "It would be a curious thing to hold that Congress, "after clearly defining the right of the importer to "receive drawback upon subsequent exportation of "the imported article on which he had paid duty, had "empowered the Secretary by regulations, which might "be proper, to secure the Government against fraud, "*to defeat totally the right which Congress has* "*granted.* If the regulations of themselves worked

"such a result, no court would hesitate to hold them "invalid as being altogether unreasonable.

* * * * * * *

"It is an error to suppose that the officers of cus- "toms, including the Secretary, are in regard to this "law created a special tribunal to ascertain and decide "conclusively upon the right to drawback. Their "function is entirely ministerial. They are author- "ized to pass upon no question essential to the claim- "ant's right as to conclude him in a court of compe- "tent jurisdiction. From the moment he presents "his sworn entry they simply ascertain quantities, "identify and mark packages, accept bonds and sure- "ties and see that the exported article leaves the port "in the ship. These and like duties being discharged, "it is the collector's duty—a mere ministerial func- "tion—to give the certificate of drawback. The "amount of it is fixed at seventeen cents per hundred "pounds by the regulation; he has nothing to do but "calculate the amount of that rate on the number of "pounds shipped. He exercises no judicial or quasi- "judicial function. He concludes nobody's rights "and has no power to do so. The rights which the "law gives cannot be defeated by his refusal to act "nor by his decision that no drawback was due.

"Neither the act of Congress, nor any rule of con- "struction known to us, makes the claimant's right, "when the facts on which it depends are clearly estab- "lished, to turn upon the view which the collector or "the Secretary, or both combined, may entertain of "the law upon that subject, and much less upon their "arbitrary refusal to perform the services which the "law imposes on them.

* * * * * * *

"The Court of Claims makes the mistake of sup- "posing that the claim is founded on the regulations "of the Secretary of the Treasury. This view cannot "be sustained. It is the law which gives the right, "and the fact that the customs officers refuse to obey "these regulations cannot defeat a right which the act "of Congress gives."

As was said by Wheeler, J., in his opinion rendered in the case of Dean Linseed Oil Co. *vs.* United States before the U. S. Circuit Court for the Eastern District of New York (78 Fed. Rep., 467–468):

> "The statute provides for a drawback equal in "amount to the duties paid, which must mean those "actually paid on the materials used, less one per centum "of such duties. The material that went into the oil "case was 35.87 pounds to each bushel, and the duty "paid on that material is readily computed by apply- "ing so much of the 20 cents per bushel of 56 pounds "as belongs to this 35.87 pounds. The duty on the "19.91 pounds of oil to each bushel of 56 pounds "could also be readily computed, if important, and "would be but a fraction of that on the oil, if it had "been manufactured in the foreign country and im- "ported separately. The law so seems clearly to "ignore value in cases of specific duty, as it provides "that the drawback shall be equal in amount to the "duties paid on the materials used, and does not pro- "vide for any apportionment upon the value; and "to comply with the law, plainly, nothing would need "to be done but to ascertain the amount of duty "actually paid upon the materials used, as has been "readily done in this case. The treasury regulations, "as applied to this case, make an *ad valorem* draw- "back upon a specific duty, instead of a specific draw- "back upon a specific duty, as the law requires.
>
> "Of course, if by the treatment of an imported "article a valuable thing is produced which leaves a "refuse of no value, so that this only valuable product "was the sole object of the importation, then nothing "could be allowed by drawback for duty on the refuse; "but here the article imported contains two valuable "things, each of which has long been recognized in "the tariff law as a proper subject of duty on importa- "tion, and of drawback on exportation; and the duty "paid on the one of low value is as much a duty paid "as that paid on the one of high value is. So, upon "these several provisions of this Tariff Act of 1894, it

"seems clear that the calculation of the drawback "upon the proportion of weight is the one which the "importer and exporter are entitled to; and that the "one on proportion of values is not legally applicable.

"It is said, on behalf of the Government, that such "drawbacks have been provided for ever since 1860, "and that the Treasury Department has, by regula- "tions when those were authorized and without them "when they were not, always computed these draw- "backs in proportion to values; and that the passing "of new tariff acts providing such drawbacks, when "such action of the Treasury Department was going "on, was an implied approval of that method, and a "warrant for the present regulations, under which "these drawbacks have been computed.

"It also appears that from 1870 to 1894 no draw- "back on oil cake was allowed. In all that time no "treasury regulation would be applicable to this par- "ticular subject, and during all that time this article "was a subject of a particular law, excluding it from "drawback. *The plaintiff's claims are founded not "on the regulations of the Treasury Department at "all, but on the law, which gives the right; and that "the customs officers refused to follow the law and "followed the regulations does not defeat the right "which the law gives* (Campbell *vs.* United States, 107 "U. S., 407). Under these circumstances the prac- "tice of the Customs and Treasury Departments would "not seem to be material (United States *vs.* Graham, "110 U. S., 219; United States *vs.* Alger, 152 U. S., "384). Upon this view of the case, the plaintiff seems "to be entitled to a judgment for the amount of these "two sums, which is $4,521.10."

This clear reasoning of the circuit judge was concurred in by Wallace, J., who, in his dissenting opinion at the time the cited case was before the U. S. Circuit Court of Appeals, said (87 Fed. Rep., 453, page 457):

"I am unable to concur in the judgment in this "cause.

"Imported materials, viz.:—'linseed,' were used in "the production here of two manufactured articles, "viz.:—linseed oil and oil-cake. The plaintiff upon "exporting the oil-cake produced from a given num- "ber of pounds of the imported linseed was entitled "to a drawback under the provisions of section 22 of "the act of Congress of August 27, 1894, which pro- "vides as follows: 'Where imported materials, on " 'which duties have been paid, are used in the manu- " 'facture of articles manufactured or produced in " 'the United States, there shall be allowed on the " 'exportation of such articles a drawback equal in " 'amount to the duties paid on the materials used, " 'less one per centum of such duties.' Upon the "linseed used in the oil-cake the plaintiff had paid a "duty of twenty per cent for every 56 pounds, "amounting to $4,521.09. According to the judg- "ment of the court, the plaintiff is entitled to a draw- "back of only about six per cent for every 56 pounds, "amounting to $1,498.46, upon the theory that it is "to be allowed not upon the number of pounds of "the linseed used in the oil cake, but pursuant to a "mathematical formula adopted by the Treasury "Department. The statute gives no sanction for "such a mode of computing the drawback. *The only "inquiry which it permits is as to the quantity of the "imported material in the exported article and the "duty originally paid thereon.* The mathematical "formula which has been applied cannot possibly "lead to a result which satisfies the statute.

"It is true that between 1861 and 1870, while a "similar statute was in force, it was the usage of the "officers of the Treasury Department to compute the "drawback according to this formula, but the case is "not one for the application of the rule that where "a statute is ambiguous the practical interpretation "given by the executive officers charged with its ad- "ministration is entitled to great weight. The statute "is not ambiguous, but is as plain as language can "make it."

Speaking to the same point, the Supreme Court in *St. Paul, &c., Railway Co. vs. Phelps,* 137 U. S., 528, 536, said:

> "But where a statute, as in this case, is clear and "free from all ambiguity, we think the letter of it is "not to be disregarded in favor of a mere presump- "tion as to what is termed the policy of the Govern- "ment, *even though it may be the settled practice of "the Department."* (Italics ours.)

In *Morrill vs. Jones,* 106 U. S., 466, 467, the court said:

> "The Secretary of the Treasury cannot by his reg- "ulations alter or amend a revenue law. All he can "do is to regulate the mode of proceeding to carry "into effect what Congress has enacted. In the "present case we are entirely satisfied the regulation "acted upon by the collector was in excess of the "power of the Secretary. The statute clearly in- "cludes animals of all classes. The regulation seeks "to confine its operation to animals of 'superior " 'stock.' This is manifestly an attempt to put into "the body of the statute a limitation which Congress "did not think it necessary to prescribe. Congress "was willing to admit duty free all animals specially "imported for breeding purposes; the Secretary "thought this privilege should be confined to such "animals as were adapted to the improvement of "breeds already in the United States. In our opin- "ion, the object of the Secretary could only be ac- "complished by an amendment of the law. That is "not the office of a Treasury regulation."

So here section 22 of the act of August 27, 1894, provides—

> "a drawback equal in amount to the duties paid on "the materials *used,* less one per centum of such "duties."

The material so "used" in the manufacture of the exported oil-cake was 35.87 pounds out of each bushel of 56 pounds of

imported linseed. That 35.87 pounds had *paid* duty at the rate of 20 cents per bushel of 56 pounds. Having so *paid* duty, it was entitled to the drawback in the same ratio, to-wit, 35.87/56 of the duty so paid on each bushel. Quantity and not value is the sole and controlling factor.

That the statute contemplated the computation of a drawback upon the basis of quantity is all the clearer from the wording of the first proviso of section 22, which reads:

> "*Provided,* That when the articles exported are "made in part from domestic materials *the imported* "*materials* or parts of the articles made from such "materials, *shall so appear* in the completed articles "that the *quantity* or *measure* thereof may be ascer- "tained."

III.

In the court below counsel for the Government referred to numerous cases laying down the rule that great weight is to be given by the courts to the construction placed upon a statute by the Executive Department charged with its enforcement, it being pointed out that from 1861 to 1897 drawback was computed upon a value and not a weight basis.

It should be noted first of all that during this period oil-cake was expressly excepted from the operation of the drawback clauses of the tariff acts from 1870 to 1894, so that the drawback allowable on oil-cake was computed on a value basis for only twelve years, consisting of two periods of nine and three years, respectively, separated by an interim of about twenty-four years. In the second place, the rule of judicial construction which attaches importance to executive construction presupposes that the language of the statute to be construed is ambiguous and that the meaning of the statute is, therefore, not clear.

Where the Language of a Statute is Free from Ambiguity the Statute Must be Literally Enforced.

United States vs. Fisher, 2 Cranch, 358, 387.
Denn vs. Reid, 10 Pet., 524, 527.
Lewis vs. United States, 92 U. S., 618, 621.
Thornley vs. Unitcd States, 113 U. S., 310, 313.
Lake County vs. Rollins, 130 U. S., 662, 670, 671.
Bate Refrigerating Company vs. Sulzberger, 157 U. S., 1, 36–37.

In *United States vs. Fisher, supra,* the issue related to the right of the United States to priority in the distribution of the assets of a bankrupt indebted to the United States as indorser of a foreign bill of exchange. Priority was claimed under a statute entitled "an act to provide more effectually for the settlement of accounts between the United States and receivers of public money," section 5 whereof provided, "That where any revenue officer, *or other person,* hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent * * * the debt due the United States shall be first satisfied." It was contended that the statute did not relate to the class of debtors to which defendant belonged, and the suggestion was made that had Congress intended to include general debtors of the United States within the provisions of the statute it would have used the expression "any person indebted to the United States" and not "any revenue officer, or other person hereafter becoming indebted to the United States." This contention was answered by the court as follows:

> "It is true the mode of expression which has been "suggested is at least as appropriate as that which has "been used; but between the two there is no difference "of meaning, and *it cannot be pretended that the "natural sense of words is to be disregarded, because "that which they import might have been bettter, or "more directly expressed."* (Italics ours.)

Applying this principle to the drawback clause in issue here it follows that *even if it be admitted that Congress might have said, in so many words, that the drawback should be computed on a weight basis, the language used—"a drawback equal in amount to the duties paid on the materials used"—taken in its natural sense, necessarily means the same thing in a case where the duty itself was levied on a weight basis.*

In *Bate Refrigerating Company vs. Sulzberger, supra,* the Supreme Court was called upon to construe section 4887 R. S., which provides that no patent for an invention shall be refused or declared invalid "by reason of its having been first patented or caused to be patented in a foreign country, unless the same has been introduced into public use in the United States more than two years prior to the application. But every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent," etc. It was contended that an invention should not be deemed to have been "previously patented in a foreign country," unless the foreign patent was granted prior to the application for the American patent. The court replied:

> "In our judgment the language used is so plain
> "and unambiguous that a refusal to recognize its
> "natural, obvious meaning would be justly regarded
> "as indicating a purpose to change the law by judicial
> "action upon some supposed policy of Congress."

In *Denn vs. Reid, supra,* the court, after adopting a literal construction of the statute involved in the case, said:

> "This, it must be admitted, when we consider the
> "mischief the law was probably intended to remedy, is
> "a somewhat technical construction of the act, and
> "cases may be found where courts have construed a
> "statute most liberally to effectuate the remedy, but
> "*where the language of the act is explicit, there is*

> *"great danger in departing from the words used, to "give an effect to the law which may be supposed to "have been designed by the legislature."* (Italics ours.)

Where the Language of a Statute is Clear, Executive Construction in Violation of Its Terms is Entitled to No Weight.

> *United States vs. Temple,* 105 U. S., 97, 99.
> *Swift Company vs. United States, Ibid.,* 691, 795.
> *United States vs. Graham,* 110 U. S., 219, 221.
> *St. Paul, etc., Ry. Co. vs. Phelps,* 137 U. S., 528, 536.
> *United States vs. Alger,* 152 U. S., 384, 397.

In *United States vs. Graham, supra,* the claimant, a naval officer, sued to recover mileage as provided in the following portion of the act of March 3, 1835 (4 Stat. L., 757):

> "It is hereby expressly declared that the yearly al-"lowance provided for in this act is all the pay, com-"pensation, and allowance that shall be received un-"der any circumstances whatever, by any such officer "or person, except for traveling expenses under or-"ders, for which ten cents per mile shall be allowed."

Claimant had traveled, under orders, partly within and partly without the United States. He claimed the statutory mileage for the entire distance, but was allowed that rate only for travel within the United States and actual expenses for travel abroad. Suit was brought to recover the difference between mileage computed on the statutory basis and the actual allowance for the travel abroad. The Government relied upon the long-standing interpretation of the act of 1835 by the Navy Department, whose regulations provided that "for traveling out of the United States the actual expenses only are allowed." This court (18 Ct. Cl., 83) gave

judgment for the claimant and the Supreme Court in turn affirmed that judgment, using this language:

> "Such being the case, it matters not what the prac-
> "tice of the departments may have been or how long
> "continued, for it can only be resorted to in aid of
> "interpretation, and 'it is not allowable to interpret
> " 'what has no need of interpretation.' If there were
> "ambiguity or doubt, then such a practice, begun so
> "early and continued so long, would be in the high-
> "est degree persuasive, if not absolutely controlling
> "in its effect. But with language clear and precise
> "and with its meaning evident there is no room for
> "construction and consequently no need of anything
> "to give it aid."

It is now submitted that the language of the drawback clause of the act of 1894 is clear and unambiguous, and that therefore this case comes within the scope of the principles established by the cases cited *supra*. The language used is *"a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties."* These words prescribe the end to be attained—*i. e.*, the return of the duty paid on importation less one per centum of such duties. But the questions naturally arise: Did Congress, in using this language, prescribe the means of attaining that end? Did Congress prescribe the process by which the problem of returning such duty could be solved? Necessarily so. Adapting the language of the drawback clause to this case, the fundamental question presents itself: What sum equals in amount the duty paid on the material used in the manufacture of the oil-cake? And this in turn leads to the question: What material entered into the manufacture of the oil-cake? Following out these questions, we find that the oil-cake was manufactured from linseed and that the duty paid on the linseed when imported was at the rate of 20 cents per bushel of fifty-six pounds. That duty was levied alike upon every molecule of matter in the imported seed, irrespective of its chemical composition, at the same

uniform, quantitative rate. The duty was not at one rate for the oil and another for the cake material and still another for the refuse matter in the seed. It was a duty upon a homogeneous and not a heterogeneous mass of matter. THE VICE OF THE CONSTRUCTION CONTENDED FOR BY THE GOVERNMENT IS THAT IT SEES ONLY THE OIL AND THE CAKE, ONLY THE MANUFACTURED PRODUCTS, IN THE IMPORTED RAW MATERIAL, AND REFUSES TO RECOGNIZE THAT WHAT WAS ACTUALLY IMPORTED AND ACTUALLY DUTIABLE WAS JUST SO MUCH LINSEED, AND NOTHING MORE. Instead of allowing the section of the statute imposing a duty on linseed to read, as it does, "flaxseed, or linseed, poppy seed and other oil seeds specially provided for in this act, twenty cents per bushel of fifty-six pounds," and giving the natural and ordinary meaning to the language of the section, the Government insists on amending the statute, without legislative sanction, so that it shall read, in effect, "flaxseed or linseed, poppy seed, and other oil seeds specially provided for in this act, twenty cents per bushel of fifty-six pounds, which shall be considered as apportioned between the oil and other products which may be manufactured from the seeds in the proportion that the market value of the oil bears to the market value of such other manufactured products." The strange thing about the construction contended for by the Government is that, although the duty on the imported seed is and must be paid on importation, it is impossible to tell what amount of the duty so levied was paid on a given portion of the imported raw material until the seed has been manufactured into oil and cake and the market values of these products have been ascertained. Should perchance one of these products have no market value, the entire duty paid on importation must needs be charged to the other on exportation. *If, for example, the oil-cake were unsalable and the oil were exported, the Government would, under its theory, be obliged to return to the exporter the entire duty paid on importation* (*less one per centum*), *notwithstanding*

that the oil is only 19 91/56 *of the entire imported raw material. And, conversely, should there be no market for the oil, then the cake would, on exportation, be entitled to a drawback equal to the whole duty paid less one per centum, although it is only* 35 87/56 *of the entire mass imported and dutiable.* Should such situations arise, it is safe to say that the Government would insist on a return of duty upon a weight basis only.

That the drawback provision of the act of 1894 prescribes the means of computing the result as well as the result itself is further shown by the language of the first clause of the second proviso, "That the drawback on any articles allowed under existing law shall be continued at the *rate* herein provided." This language shows that Congress intended to establish the *rate* of drawback. The word "rate" is defined by Webster to mean *"a fixed relation of quantity, amount, or degree between two things; a ratio, a proportion; also a charge, payment, or price, fixed according to a ratio, scale, or standard; as, the rate of exchange; the control of railroad rates."*

23 *American & English Encyclopedia* (2d ed.), 888, gives this definition:

> "Rate is defined to be the price or amount stated "or fixed on anything. The term is also used in the "sense of proportion or percentage; a standard of "valuation; a rule or measure of assessment; an as- "assessment according to a given standard."

In the light of these definitions, the use of the word "rate" is significant as showing an intention on the part of Congress to fix definitely the manner of ascertaining the drawback due in a given case as well as the amount of drawback allowable.

IV.

Neither is it true that if oil-cake was entitled to any drawback at all "the method of apportioning that drawback between the two products (*i. e.*, the method adopted and used by the Treasury Department based upon relative values) was the only practical and rational method that could have been employed, and that it was the method contemplated by Congress, if that body intended that any drawback should be allowed in cases where only one of the two products resulting from the manufacture of imported materials is exported." Upon this point the contention is advanced that the statute is silent on the question "of *how* the drawback duty shall be *divided* where the single imported material produced two or three different products." It has been shown previously that this is not the case, but that, on the contrary, the method of computing the drawback is necessarily fixed by the all-embracing expression, "a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties," taken in conjunction with the sections of the act by which the rate of duty and basis of its computation are established for the given imported material so used.

It is claimed further that a drawback on a value basis is fair and equitable, while a drawback estimated on a weight basis is unfair and inequitable, and an example is given, taking the value of the oil in one bushel of seed as $1.46 and that of the cake as $0.49, to show that on a value basis the drawback on the oil from one bushel of seed would be $0.1497 and on the oil-cake $0.0502, while the drawback estimated on a weight basis would be $0.072 on the oil and $0.128 on the oil-cake. It is submitted that there is no unfairness in this when it is remembered that the duty on importation was levied alike on the oil and the cake material in the raw seed, and that, therefore, *when the exporter is paid the drawback on a weight basis he is but receiving what was paid by the importer on importation of the raw*

seed. And even if it be conceded that the repayment of the drawback on a weight basis would be unfair that affords no reason why the clear language of the statute should be amended without legislative authorization.

It has been sought to build up an argument against this view on the theory that the tariff act of 1894 was designed primarily as a revenue-bearing measure, and secondarily as a source of protection to American manufacturers of oil and growers of linseed, and the claim is made that the allowance of a drawback on a weight basis would accomplish neither of these objects. The case cited as laying down the principle that the general purpose of a tariff act is a proper subject of consideration in construing its provisions (*Arnold vs. The United States,* 147 U. S., 494) certainly does not go to the extreme that counsel for the Government contend for. In that case the court considered, first of all, the language of the statute in controversy, which was clear enough to settle the matter, and then mentioned, merely incidentally, that the result so reached was consonant with the underlying purpose of the tariff act. The Supreme Court has held elsewhere that the policy underlying a statute is an uncertain guide of construction.

Hadden vs. The Collector, 5 Wall., 107, 111–112.
Dewey vs. United States, 178 U. S., 510, 521.

In the case first cited the court was called upon to interpret the tariff act of July 14, 1862, which provided that there should be levied "on all goods, wares, and merchandise of the growth or produce of countries beyond the Cape of Good Hope, when imported from place this side of the Cape of Good Hope, a duty of 10 per cent *ad valorem,* and in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production." Plaintiff had imported raw silk in the manner outlined by the statute and paid, under protest, the 10 per cent additional duty. He sued to recover the duty so paid, and contended

that the statute did not embrace imported raw materials, since its purpose was to build up American manufactures. The court said in reply:

> "The supposed policy of the Government is stated "to be the encouragement of manufactures by impos- "ing restrictions on goods manufactured in whole or "in part abroad, and hence it is argued that it was "against such policy to impose duties on the raw ma- "terial.
>
> "*Little weight can be given to considerations of this "character.* The encouragement of manufactures does "not appear to have been the object of the act, but on "the contrary, its object was manifestly to increase "the revenues of the country, and it may well have "been supposed by the law-makers that in many cases "the raw material could bear a duty without decreas- "ing the importation, or injuriously affecting the "manufacturing interests.
>
> "*What is termed the policy of the Government with "reference to any particular matter is generally a very "uncertain thing, upon which all sorts of opinions, "each variant from the other, may be formed by dif- "ferent persons. It is a ground much too unstable "upon which to rest the judgment of the court in the "interpretation of statutes.*" (Italics ours.)

And in the latter case above cited the Supreme Court tersely stated the same doctrine as follows:

> "This court has nothing to do with questions of "mere policy that may be supposed to underlie the "action of Congress. * * * Our province is to "declare what the law is, and not, under the guise of "interpretation, or under the influence of what may "be surmised to be the policy of the Government, so "to depart from sound rules of construction as in effect "to adjudge that to be law which Congress has not "enacted as such. Here the language used by Con- "gress is unambiguous. It is so clear that the mind "at once recognizes the intent of Congress. Inter- "preted according to the natural import of the words

> "used, the statute involves no absurdity or contradic-
> "tion, and there is consequently no room for construc-
> "tion. Our duty is to give effect to the will of Con-
> "gress as thus plainly expressed."

These authorities show that little reliance is to be put upon a construction of a statute based upon what is supposed to be "the dominant idea," as counsel expresses it, running through it. Furthermore, even admitting that some consideration is to be given to the "dominant idea running through the tariff act of 1894 (Wilson Bill)," the conclusions which counsel for the Government seek to establish thereby do not follow. It may be conceded that the primary purpose of that act was, in general, to raise revenue, but this concession does not involve an admission that every section of the act is to be construed to effectuate that purpose. With regard to imports comprehended within the drawback clause, it was certainly not the primary purpose to raise revenue by taxing them upon importation. The Supreme Court so held in the case of *Campbell vs. United States*, 107 U. S., 407, 413, so much referred to by both sides, when it said:

> "The purpose of the drawback provision is to make
> "duty free imports which are manufactured here and
> "then returned whence they came or to some other
> "foreign country—articles which are not sold or con-
> "sumed in the United States."

It needs no argument to show that a purpose "to make duty free" and a purpose to raise revenue are inconsistent, and mutually exclusive when applied to the subject of import duties. It is, therefore, submitted that, even if the motives which prompted Congress to pass the Wilson Bill are proper subjects of inquiry in determining the meaning of that law, the contention of counsel for the Government is not helped thereby, in so far as it may be said in a general way that the tariff of 1894 was a revenue measure.

But before passing to a consideration of what counsel for

the Government conceives to be the secondary purpose of the act of 1894, we deem it advisable to refute the *innuendo* contained in counsel's argument relating to the applicability of the primary revenue-raising purpose of the act to this case. Counsel seem to suggest that the exportation of the oil cake was merely a part of a prearranged scheme to export the non-valuable product of the imported raw material, claim a drawback computed on a weight basis, and thereby in effect to import the oil contained in the seed practically duty free, while if the oil itself were imported it would have been dutiable at twenty cents per gallon. This suggestion is rebutted by the fact that practically all the oil-cake manufactured in the United States from 1870 to 1894, during which period no drawback was allowed, was sent abroad. The reason why the oil-cake, and not the oil, was exported was that there was no market for the cake in the United States, while there was an ample market for the oil. Says Mr. Spencer Kellogg, whose intimate knowledge of the linseed-oil industry in this country stamps any statement of his on the subject as authoritative, in his article in volume IX, Encyclopedia Americana, previously referred to:

> "Although used extensively abroad, it is a singular "fact that our farmers in the United States have "little, if any, appreciation of its (oil-cake's) value. "Our own country should be the largest consumer of "this most valuable by-product; actual figures, how-"ever, show that only about twenty per cent is re-"tained for home consumption. The first cost is "somewhat greater than for other foodstuffs, and our "farmers as a general rule lack the knowledge of its "value, which comes only by experiment and valu-"able experience. * * * It is impossible to as-"certain the exact quantities of linseed cake exported "in the early years of the industry, as oil-cake and "oil-cake meals were classified under one head. It is, "however, fairly safe to assume that by far the largest "part of the output each year, in the proportion of "about thirty-eight to forty pounds of cake per bushel

> "of seed crushed, was sent out of the country; this "from the fact that only in recent years has our "farmer become educated to its use." (N. B.—The article from which this extract is taken was written about 1903.)

Counsel contend that the secondary purpose of the tariff of 1894 was "to afford protection to the American manufacturers and growers of linseed," and that the allowance of the drawback on a weight basis would take away this intended protection. It is submitted that AS BETWEEN THE AMERICAN MANUFACTURER OF LINSEED OIL AND THE GROWER OF DOMESTIC LINSEED THE INTENTION OF CONGRESS WAS TO GIVE THE FORMER A GREATER PROTECTION THAN THE LATTER. This is shown by the fact that the duty imposed upon the raw seed for the protection of the domestic grower was twenty cents per bushel, from which 2.654 gallons of oil could be extracted, while the duty on the oil, intended to protect the American manufacturer, was twenty cents per gallon, so that if the manufacturer imported the seed and charged the entire duty paid against the oil alone extracted therefrom he would have secured a gallon of oil at an import duty of somewhat less than eight cents. And if in this calculation allowance is made for a drawback on the exported cake, whether on a weight or a value basis, the duty per gallon on oil manufactured here from imported seed would be smaller yet. This, it is submitted, shows that as between the domestic manufacturer of linseed oil and the domestic grower of linseed Congress intended the greater protection for the former, thereby stimulating the linseed-oil industry, to the manifest benefit of both capital and labor. What construction of the drawback clause of the act of 1894, so far as it related to the products of linseed, would be most in harmony with this purpose, in the light of the conditions, necessarily known to Congress, that the domestic market for linseed oil was ample for the consumption of

all oil manufactured here, whereas the cake material could be disposed of only abroad? Necessarily that construction which apportioned the larger part of the total drawback allowable to the oil-cake intended for exportation. Nor would this drive the domestic grower of linseed out of business, for under normal competitive market conditions, made necessary by the Sherman Anti-trust Act of only four years before, the result would be cheaper linseed oil, and cheaper linseed oil would in turn mean increased consumption of linseed oil, and consequently increased demand for the raw seed. In this fashion the ultimate result would be that the American grower of linseed would have an enlarged market to supply that never existed before.

The argument advanced that if the drawback were computed on a weight basis the exporter of oil manufactured from imported seed would not be in a position to compete effectively in the markets abroad depends for its soundness upon the prevailing market price in the particular foreign market as compared with the cost of producing oil here from imported seed plus the cost of transporting such oil to the foreign market, none of which factors have been reckoned with in the argument of counsel. And even if the soundness of the argument be granted, it may be said in reply that very little American manufactured oil has ever been exported, that the home market has not been fully exploited even yet, and that consequently the argument is premised upon a condition of fact that does not exist now and did not exist in 1894, when the tariff act in controversy was passed.

There would seem to be no reasonable escape from the plain, literal reading and application of the law. Congress saw fit to impose a duty on linseed according to weight and not value. It also authorized a drawback, paying on exportation "equal in amount to the duties paid on the ma-"terials used, less one per centum of such duties," and such equality can only be ascertained through the "quantity" or "measure" of the exported article. To seek the application

of drawback based on value is to ignore the plain reading and obvious meaning of the law and is wholly inconsistent with both.

V.

The Court of Claims rendered no opinion of its own, but rested its conclusion of law on authority of *United States vs. The Dean Linseed Oil Company,* 87 Fed. Rep., 453.

That case was argued before Circuit Judges Wallace, Lacombe, and Shipman. The opinion was written by Judge Shipman and concurred in by Judge Lacombe. Judge Wallace dissented, in a short opinion, maintaining that the language of the drawback clause was entirely clear and that it was the duty of the court to enforce it literally. The opinion of Judge Wheeler in the court below (78 Fed. Rep., 467) was to the same effect as Judge Wallace. This precise question has, therefore, been before four Federal judges, two of whom have held in favor of this appellant and two in favor of the Government. Under such circumstances, the authority cited by the Court of Claims was somewhat meager to support a judgment without opinion, and surely will not be considered as at all binding upon this court.

For reasons stated, the Court of Claims erred in dismissing the claim and its judgment should accordingly be reversed.

Respectfully submitted,

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